

DUNCAN OIL, INC.
v.
ACTING NAVAJO AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 90-138-A

Decided July 12, 1991

Appeal from a determination that a tribal oil and gas lease had expired for failure to produce oil and/or gas in paying quantities.

Vacated and remanded.

1. Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally

Where an oil and gas lease of Indian land imposes a duty upon the lessee to avoid waste and protect trust property, the lease does not expire because of a shut-in required to avoid an oil spill.

2. Administrative Procedure: Administrative Record--Administrative Procedure: Hearings--Indians: Leases and Permits: Cancellation or Revocation

Where the Bureau of Indian Affairs conducts a hearing under 25 CFR 211.27, it is responsible for preserving the evidence presented at the hearing.

3. Administrative Procedure: Administrative Record--Indians: Leases and Permits: Generally--Indians: Mineral Resources: Oil and Gas: Generally

When the administrative record fails to support a Bureau of Indian Affairs Area Director's decision that an oil and gas lease of Indian land has expired because of failure to produce oil and/or gas in paying quantities, the decision will be vacated and the case remanded for development of an adequate record and issuance of a new decision.

APPEARANCES: W. S. Fallin, Production Manager, for appellant; Thomas O'Hare, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Window Rock, Arizona, for appellee.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Duncan Oil, Inc. (Duncan), seeks review of a July 10, 1990, decision of the Acting Navajo Area Director, Bureau of Indian

Affairs (Area Director; BIA), stating that Navajo Tribal Oil and Gas Lease No. 14-20-0603-10008 (Lease No. 10008) was terminated for failure to produce hydrocarbon substances in paying quantities. For the reasons discussed below, the Board vacates the Area Director's decision and remands this case for further proceedings.

Background

Lease No. 10008 between the Navajo Nation (Tribe) and Walter Duncan was executed on November 7, 1966, and approved by the Acting Assistant Area Director on December 12, 1966. It covers all of sec. 6 in T. 29 N., R. 16 W., New Mexico Principal Meridian, San Juan County, New Mexico. The lease term is "5 years from and after the approval hereof by the Secretary of the Interior and as much longer thereafter as oil and/or gas is produced in paying quantities from said land."

Duncan is successor-in-interest to Walter Duncan. It also holds, or held, Navajo Tribal Leases Nos. 14-20-0603-10009 and 14-20-0603-10010. ^{1/} In 1984, Duncan requested permission from the Bureau of Land Management (BLM) to commingle production from the three leases, stating that "[t]he primary purpose of the commingling is to allow removal of production equipment and earthen pits from the low-lying area adjacent with the San Juan River, to the higher ground of the river terrace" (Duncan's Letter of May 30, 1984, concerning commingling of production at 1). Simultaneously, Duncan requested permission for off-lease storage and measurement of liquids produced on the leases, stating that "[t]he proposed operation will gather and transport production from the leases (application submitted to commingle) in the low-lying area adjacent to the river to the upper river terrace. Producing in the described manner will minimize the chance of a spill due to flooding and/or a rising water table" (Duncan's Letter of May 30, 1984, concerning off-lease storage and measurement at 1). In both letters, appellant stated that the applications were being made in conjunction with an overall change in operations requested by the Tribe. BLM recommended that BIA approve the applications, and the Acting Assistant Area Director wrote to the Tribe on July 16, 1984, stating that he believed the proposed method of allocating production would be satisfactory; he requested the Tribe to advise him whether it concurred. It is not clear whether the Tribe concurred. Apparently, however, the proposal was never implemented. ^{2/}

^{1/} It is not clear from the record whether these leases are still extant.

^{2/} In an Oct. 10, 1988, letter to BIA, Duncan stated:

"In May 1984, an application to commingle production and for off-lease storage and measurement was prepared and sent in conjunction with the proposed gathering system for the wells. From March, 1984 until January, 1985, Duncan representatives met with the BIA and Navajo Tribe at least six times to examine the installation of the gathering line. Up to this point in time, we had been unable to proceed with any of the proposals that we had made even though representatives from the BIA had agreed to the installation."

By memorandum of April 7, 1988, to the Area Director, the Assistant District Manager, Albuquerque District, BLM, recommended termination of Lease No. 10008 as of November 30, 1987, because production had ceased in November 1987. By letter of September 23, 1988, the Assistant Area Director notified Duncan of BIA's intent to terminate the lease. He stated further:

In accordance with 25 CFR 211.27 and provision 6 of the said lease, you are hereby given thirty (30) days from receipt of this letter to show cause why this lease should not be terminated. If no request for a hearing is received within the aforementioned thirty (30) day period, the lease shall be declared null and void.

Duncan responded on October 10, 1988, stating in part:

[Lease No. 10008] has and is being produced within the requirements of the Navajo tribal authorities. The period of no production noted during 1987 was due to adherence to tribal and government restrictions; therefore, the lease should not be terminated because we complied with the regulations of the governing authority and provisions 3 and 8 of said lease.

Production from [Lease No. 10008] was shut in during December, 1987 and January, February, March, and April, 1988. The reason the wells were shut in was to prevent an oil spill from occurring in the surface lines of [Lease No. 10008]. In the summer of 1987, producing these wells in this manner became necessary in order to comply with regulations and wishes of the Navajo Tribe, the Bureau of Land Management, and the State of New Mexico.

* * * * *

In early 1987, due to requests by the Bureau of Land Management, the Navajo Tribe, and the State of New Mexico, Duncan agreed to remove vessels within the San Juan River low lying area and to fill in the production pits. The only way to accomplish the change without the approval to install a gathering line was to produce all fluids from the wells up existing surface lines to facilities on the above mesa. Because both oil and water production was pumped up the surface lines, it became necessary to shut in and drain all lines whenever the weather became cold enough to potentially freeze the water. Without the shut-in, a freeze would have caused a split in the flowline and a production spill would have occurred.

Duncan has tried with utmost diligence and prudence to comply with the wishes of the Navajo Tribe and the BIA in our conductance of operations. We have provided numerous applications and filing fees for conductance of work which was agreed to, but never approved. The steps that we took in shutting in the wells were done as any prudent operator would do to prevent leaks or production spills in the area. To produce these wells during

the winter months in any other way could only lead to some sort of spill. Therefore, we believe that Duncan has met the obligations of the lease and has acted prudently in producing this lease within the guidelines of the BLM, the BIA, the Navajo Tribe and general good, safe operating practices. For this reason, we request that the BIA review this lease and favorably remove any intent to terminate.

In a December 21, 1988, letter to the BIA Area Supervisory Realty Specialist for Minerals, Duncan stated:

On October 10, 1988, we responded to your letter of September 23, 1988, regarding the intent to terminate [Lease No. 10008]. On October 3, 1988, we received a phone call from you saying that you were in agreement with our letter not to terminate the lease and would approve the status of the lease if BLM would concur. On October 20, 1988, I spoke to Steven Mason at the BLM in Durango and he indicated that the BLM would agree that [Lease No. 10008] should remain in effect. I would like to have a confirmation in writing that [Lease No. 10008] has been accepted as being intact so that we may have a written record to your original letter.

Apparently, BIA did not respond to Duncan's December 21, 1988, letter. However, by letter of January 27, 1989, the Assistant Area Director acknowledged receipt of the October 10, 1988, letter and scheduled a show cause hearing for February 15, 1989.

A hearing or meeting was held on February 15, 1989, at which several BIA staff members, representatives of the Tribe, a BLM petroleum engineer, representatives of Duncan, and some others were present. It does not appear that the Area Director was present. 3/

In his decision dated July 10, 1990, the Area Director stated:

Duncan Oil, Inc. made a formal request for a show cause hearing on [Lease No. 10008]. The hearing was held on February 15, 1989 in Window Rock, Arizona. Duncan Oil, Inc. showed cause as to why the lease should not be terminated for non-production of hydrocarbon substances in paying quantities in its extended term.

We have continually monitored the [well on Lease No. 10008]. Our records indicate this well is not producing in paying quantities.

We have reviewed your lease with the Navajo Tribe and it has been determined that the lease should be terminated. This is to

3/ The only document in the record concerning this hearing or meeting is a sign-in sheet, which does not include the Area Director's signature.

give you formal notice that [Lease No. 10008] is hereby terminated as of the date of this letter for failure to produce hydrocarbon substances in paying quantities.

Duncan's appeal from this decision was received by the Board on August 16, 1990. Duncan and the Area Director filed briefs.

Discussion and Conclusions

Duncan concedes that there was no production on Lease No. 10008 from December 1987 through April 1988 but contends that the lease was shut in for good reason. Duncan states in its opening brief at page 1:

As discussed at the February, 1989 show cause hearing and in our October 10, 1988 letter, we have to curtail production during the winter months. Production curtailment occurred again in the winters of 1988-1989 and 1989-1990.

* * * I am also very disappointed that there were no minutes taken at the February 15, 1989 show cause hearing where I thought John Bettridge of our office convinced Tribal and BLM personnel that there was a legitimate reason why Duncan ceased production during the winter of 1987-1988.

The Area Director argues that appellant failed to request permission to shut in the lease and that there is no verification in the record of appellant's assertions that it shut in the lease to avoid an oil spill and to comply with requests of the Tribe, BLM, and the State of New Mexico. The Area Director further argues that the Board's decision in Mobil Oil Corp. v. Albuquerque Area Director, 18 IBIA 315, 97 I.D. 215 (1990), requires that the lease be found to have expired by operation of law.

Duncan does not contend that it sought permission to shut in the lease. It does contend, however, that it was acting in compliance with paragraph 3(f) of its lease, which provides:

DILIGENCE, PREVENTION OF WASTE. - [The lessee hereby agrees t]o exercise reasonable diligence in drilling and operating wells for oil and gas on the lands covered hereby, while such products can be secured in paying quantities; to carry on all operations hereunder in a good and workmanlike manner in accordance with approved methods and practice, having due regard for the prevention of waste of oil or gas developed on the land, or the entrance of water through wells drilled by the lessee to the productive sands or oil or gas-bearing strata to the destruction or injury of the oil or gas deposits, the preservation and conservation of the property for future productive operations, and to the health and safety of workmen and employees; to plug securely all wells before abandoning the same and to effectually shut off all water from the oil or gas-bearing strata; not to drill any well within 200 feet of any house or barn now on the premises without the lessor's written consent; to carry out at the expense of the

lessee all reasonable orders and requirements of the oil and gas supervisor relative to prevention of waste, and preservation of the property and the health and safety of workmen; to bury all pipelines crossing tillable lands below plow depth unless other arrangements therefor are made with the superintendent; to pay the lessor all damages to crops, buildings, and other improvements of the lessor occasioned by the lessee's operations: Provided, That the lessee shall not be held responsible for delays or casualties occasioned by causes beyond the lessee's control.

Accord 25 CFR 211.19.

Duncan also contends that it changed its production methods during 1987 in order to comply with requests made by BLM, the Tribe, and the State of New Mexico, and that this change led to the necessity to shut in the lease during winter months. Duncan contends that, in this regard, it was acting in compliance with paragraph 8 of its lease, which provides:

DRILLING AND PRODUCING RESTRICTIONS. - It is covenanted and agreed that the Secretary of the Interior may impose restrictions as to time or times for the drilling of wells and as to the production from any well or wells drilled when in his judgment such action may be necessary or proper for the protection of the natural resources of the leased land and the interests of the Indian lessor, and in the exercise of his judgment the Secretary may take into consideration, among other things, Federal laws, State laws, or regulations by competent Federal or State authorities or lawful agreements among operators regulating either drilling or production, or both.

In Mobil, the Board held that an oil and gas lease issued under the Indian Mineral Leasing Act of 1938 (IMLA), 25 U.S.C. §§ 396a-396f (1988), for a primary term and "as long thereafter as oil and/or gas is produced in paying quantities" expires by operation of law when, after the primary term, production ceases. Mobil had shut in its leases for a period of at least 6 months because of adverse marketing conditions. The Board found that no provision of the IMLA, the regulations at 25 CFR Part 211, or Mobil's leases excused the period of nonproduction. The Board did not hold, however, that there were no circumstances under which a period of nonproduction could be excused.

In this case, Duncan's allegations portray a substantially different set of circumstances than that addressed in Mobil. Duncan's lease required it to avoid waste and to protect the trust property. Duncan contends that a shut-in was necessary to comply with this obligation because continued operations could have caused an oil spill.

[1] It is simply not reasonable to conclude that an oil and gas lease imposes duties upon the lessee but expires if the lessee undertakes to fulfill those duties. Further, in a case where a lease duty goes to the protection and preservation of trust property, such an interpretation of the lease would clearly appear to be in derogation of the trust responsibility

of the United States--see Mobil, 18 IBIA at 329-31, 97 I.D. at 222-23--because it would encourage lessees to preserve their leases from expiration at the expense of their duties toward the trust property. Therefore, under the circumstances present here, if Duncan's decision to shut in the lease was made in the reasonable belief that a shut-in was necessary to avoid an oil spill, the Board will not find that the lease expired because of that decision.

It is true, as the Area Director contends, that the record is deficient in documentary evidence supporting Duncan's allegations. ^{4/} Normally, the burden is upon an appellant to produce evidence to support its arguments. However, in this case, the responsibility for an incomplete record must be shared, if not borne entirely, by BIA. Given the state of the record as presently constituted, the Board is not willing to assume that the absence of evidence for Duncan's position means that none was presented to BIA.

The most glaring deficiency is the lack of any written record of the February 15, 1989, hearing, except for the sign-in sheet. The Area Director concedes that "no records or minutes were kept by the BIA." He also notes that Duncan did not record the meeting and states: "If this meeting was as important as the Appellant makes it out to be, it certainly should have documented the results and sent the documentation to all interested parties" (Area Director's Brief at 2). The Area Director further argues that, because Duncan's lease expired by its own terms, no hearing was necessary and the Area Director was acting under a mistake of law in providing one. The implication of this argument is that, because the hearing was not required, BIA did not err in failing to keep a record of it.

[2] The Area Director is correct that, under Mobil, no hearing under 25 CFR 211.27 is required when a lease expires by its own terms. This is because section 211.27 applies to lease cancellations; the Board has held that a BIA determination that a lease has expired by its own terms is not a cancellation of the lease. See 18 IBIA at 323, 97 I.D. at 219. In this case, because the Area Director did not intend to cancel the lease, he was not required to offer Duncan a hearing under section 211.27. However, once he undertook to provide a hearing and advised Duncan that its evidence would be received at that time, Duncan had a right to expect that BIA would record

^{4/} There is, however, some evidence in the record which appears to support Duncan's allegations. The production summary attached to Duncan's notice of appeal and the monthly production reports in the BIA record show a distinct decrease in winter production, beginning with the winter of 1987-88, when the lease was shut in. In the following years, production was minimal during winter months but considerably higher during the rest of the year. The production figures thus tend to support Duncan's allegation concerning its reason for shutting in the lease, *i.e.*, to avoid a rupture in the line from freezing water, and its allegation that a change in production methods was necessitated by actions taken during 1987 (Appellant's Oct. 10, 1988, letter).

and preserve the evidence presented. It was BIA, not appellant, which should have recorded the hearing, if not by verbatim transcript, at least in summary form. The fact that the hearing evidence is now missing from the record will not be used to Duncan's detriment.

Duncan believes that, during the hearing, tribal and BLM personnel became convinced that the shut-in was justified. The Area Director does not dispute Duncan's perception of its success in this regard. The Board therefore accepts Duncan's perception as accurate. Although neither the Tribe nor BLM was the deciding agency in this matter, it appears, from the circumstances in which the Area Director's decision was issued, that BIA probably shared the views of the Tribe and BLM. Indeed, it appears from those circumstances, as further discussed below, that the Area Director's termination decision was not based on the 1987-88 shut-in but, rather, on production over a longer period, including the period following the hearing.

The Area Director's decision does not state that Duncan's lease was being terminated because of the shut-in. To the contrary, it states: "Duncan Oil, Inc., showed cause [at the hearing] as to why the lease should not be terminated for non-production," suggesting that Duncan had convinced BIA the shut-in was justified. Further, the decision states: "We have continually monitored the [well on Lease No. 10008]. Our records indicate this well is not producing in paying quantities." Clearly, "continual monitoring" would not have been necessary to establish that the lease had been shut in during the winter of 1987-88. The shut-in was evident from the production reports and was also conceded by Duncan.

The Area Director did not issue his decision until 17 months after the hearing. If the decision had been based on the shut-in, it could, and should, have been issued shortly after the hearing.

Other documents in the record support the conclusion that posthearing lease operations formed at least part of the basis for the decision. A May 18, 1989, memorandum from the Area Director to the Shiprock Agency Superintendent requested that the agency provide comments and a field investigation of the lease. These were necessary, the Area Director stated, "to determine whether the lease should be terminated for non-production of carbon substances in paying quantities in its extended term or reinstated in good standing." The Superintendent's May 30, 1989, response stated that the lease did not appear to be well maintained; the Superintendent noted, however, that the agency did not receive production records and therefore could not comment on whether the lease was producing in paying quantities.

Based on a number of factors: (1) Duncan's unrefuted statement concerning its apparent success at the hearing; (2) the language of the decision concerning "continual monitoring"; (3) the long delay between the hearing and the decision; and (4) the other documents concerning posthearing lease activity; the Board concludes that the Area Director's decision was not based on the shut-in, but on lease production over a longer period, including the period following the hearing.

The record includes monthly production reports from August 1987 through June 1990. These show production in every month between the hearing in February 1989 and the Area Director's decision in July 1990. ^{5/} If the posthearing period was a basis for the decision, as the Board has concluded it was, there must have been a determination that production during that period was insufficient to qualify as production in "paying quantities." Yet there is nothing in the record showing how BIA made that determination, or even showing what BIA considered to be the amount of production necessary to achieve "paying quantities."

[3] Because it clearly appears that the Area Director's decision was based on a period of time during which production was occurring, and because the record contains no justification for the conclusion that such production was not in "paying quantities," the record is inadequate to support the Area Director's decision. The decision must therefore be vacated, and the case remanded for development of an adequate record and issuance of a new decision. See Plain Feather v. Acting Billings Area Director, 18 IBIA 26 (1989).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Acting Navajo Area Director's July 10, 1990, decision is vacated, and this matter is remanded for further proceedings.

Anita Vogt
Administrative Judge

I concur:

Kathryn A. Lynn
Chief Administrative Judge

^{5/} They also show production in every month prior to the hearing, except for 5 months in the winter of 1987-88 and January 1989.

In its notice of appeal to the Board, Duncan states:

"[Appellant] has, since the February 1989 hearing, continued to produce the lease every month even during the winter so that oil production is realized. During the winter, this requires production of days or a week per month during periods when the weather is warm enough. Once warmer temperatures consistently are in the area, the well is produced full time which yields from 7-10 BOPD.

"An operator would be better off to completely shut in the lease during the winter as we did in the winter of 1987-88, but we have been producing the lease in the above manner to try and meet the concerns expressed in the February 1989 hearing."